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No. 99-1313

In the Supreme Court of the United States

DAVID I. LONGMAN; JEFFREY FEINMAN; PAUL M. GARDNER, Defined Plan Trust; EDWARD HANKIN and LINDA HANKIN,

Petitioners,

v.

FOOD LION, INCORPORATED; TOM E. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Respondents' Brief in Opposition

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QUESTION PRESENTED

In a securities fraud action based upon a television program's allegations that a company engaged in widespread labor law violations, where it is undisputed that those same allegations had been made over a year earlier by another source, were fully disclosed to the market, and were settled for an immaterial amount, does a question regarding the credibility of the original source of the allegations raise a triable issue of fact that precludes summary judgment?

CORORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the only parent corporation or publicly held company that owns 10% or more of Food Lion, Inc.'s stock is Etablissements Delhaize Freres et Cie "Le Lion" S.A., which holds Food Lion, Inc. stock directly as well as indirectly through its wholly-owned subsidiary, Delhaize The Lion America, Inc.

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STATEMENT OF THE CASE

In its decision in this case, the United States Court of Appeals for the Fourth Circuit rejected petitioners' attempt to premise a securities law violation on a television broadcast's unproven allegations of widespread off-the-clock work by Food Lion employees. Although Food Lion had repeatedly and publicly disclosed the existence of similar claims for over a year prior to the broadcast, petitioners nevertheless contended that the broadcast marked the first time that the public was credibly informed of the existence of the alleged violations and of the purported dependence of Food Lion's profits on those violations. Recognizing that the broadcast merely repeated claims that had long since been disclosed, the court held that the broadcast added nothing to the information already available to the marketplace, and thus that petitioners had failed to show that Food Lion had improperly withheld any material information.

Contrary to petitioners' contentions, the Fourth Circuit's ruling did not eliminate the presumption of reliance created by the "fraud on the market" theory by permitting public statements to establish market knowledge without regard to the credibility of the statements' source. The "credibility" of the prior *allegations* was not an issue, because the *allegations* of the broadcast, even if viewed as more credible than the earlier claims, did not establish the existence of a "fact" that rendered prior statements by Food Lion misleading. The existence of anything other than isolated, sporadic instances of off-the-clock work typical for a company of Food Lion's size has never been established. No decision of this or any other court required Food Lion to disclose the existence of a "fact" that it did not know to be true. At most, all that Food Lion was required to disclose was the existence of the allegations, which it unquestionably did. The court of appeals

had no occasion to consider whether the "truth on the market" defense to a securities fraud claim can be established without regard to the credibility of the source of the information.

A. Background

Food Lion, a publicly traded retail grocery company, was the fastest growing grocery store chain in the country in the late 1980's and early 1990's. By 1992, Food Lion operated approximately 1,000 stores, primarily in the southeastern part of the United States, had approximately 60,000 active employees, and had earnings exceeding $200 million per year.

Petitioners' assertion that Food Lion's management was aware of widespread labor law violations during this time period, Pet. at 7, was squarely rejected by the district court. Undisputed evidence showed that Food Lion had a strict corporate policy against off-the-clock work by its employees, and regularly audited its stores for compliance with this policy. Nevertheless, like any company of its size, Food Lion occasionally received reports that an employee had worked off the clock. Such reports were investigated and any violations were corrected. The information collected through Food Lion's internal controls and audits showed that off-the-clock work occurred relatively infrequently and any infractions were dealt with appropriately and effectively.

Petitioners' attempt to characterize the product of Food Lion's oversight efforts as "extensive" evidence of "widespread illegal labor practices," Pet. at 7, is refuted by an examination of the documents themselves, as the district court held. App. 101a-105a. For example, the "report . . . prepared by a Food Lion lawyer," which petitioners characterize as concluding that off-the-clock work was "unavoidable" under Food Lion's scheduling system, Pet. at 7, in fact only

speculated that Food Lion's scheduling system might result in future off-the-clock violations, and documented no current violation. The "internal survey responses . . . from employees of more than 30 Food Lion stores," *id.*, reflected complaints from a very small fraction of the approximately 60,000 employees who worked for Food Lion at the time. The "internal investigative reports" and "internal memoranda" on which petitioners relied, far from documenting "rampant" or "widespread" violations, Pet. at 7-8, again reflected the experiences of only a small portion of Food Lion's total workforce. Indeed, as the district court noted, rather than establishing widespread violations of Food Lion's policy against off-the-clock work, the evidence adduced by petitioners showed that Food Lion actively and diligently enforced that policy.[1] App. 103a-105a.

B. The *Carpenter* Complaint

Food Lion first became aware of allegations of widespread violations on September 11, 1991, when it received a copy of a complaint filed by the United Food and Commercial Workers International Union ("UFCW") with the U.S. Department of Labor ("DOL") (the "*Carpenter* complaint"). The complaint, which was purportedly filed on behalf of 183 current and former Food Lion employees and listed 223 additional employees alleged to have similar claims, asserted that Food Lion was liable for up to $338 million for

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[1] To support their claim of unlawful labor practices, petitioners also point to two settlement agreements between Food Lion and the U.S. Department of Labor in 1989 and 1990 in which Food Lion agreed to pay $300,000 in back pay related to off-the-clock work and to monitor and enforce its compliance with the FLSA. Pet. at 10 n.1. However, as the amount of the settlement suggests, these settlements involved only a small number of claims, were not indicative of widespread problems, and did not result in material liability.

permitting employees to work "off the clock" without pay in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The complaint also alleged that $64 million of Food Lion's annual profit margins was attributable to such off-the-clock work. In a press release issued the same day as the complaint, the UFCW claimed that the allegations were based on an investigation that "uncovered violations in 141 stores in 88 cities in seven states." The names of the employees alleged to have worked off the clock were redacted from the copy of the complaint provided to Food Lion, which made it impossible for Food Lion to evaluate the claims.[2]

The UFCW's allegations were widely disseminated and publicized, were known to professional analysts in the securities industry, and resulted in a drop in the price of Food Lion's stock the day after the announcement. Food Lion also disclosed the filing of the *Carpenter* complaint in filings with the Securities and Exchange Commission ("SEC").[3] The

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[2] By the time the *Carpenter* complaint was resolved in 1993, Food Lion had learned the names of only 22 of the claimants.

[3] For example, in its Form 10Q, filed with the SEC on October 22, 1991, Food Lion made the following disclosure:

> On September 11, 1991, a Complaint was filed with the United States Department of Labor, Wage and Hours Division by the United Food and Commercial Workers International Union on behalf of a number of present and former employees of the Company, alleging that the Company is engaged in violations of the Fair Labor Standards Act . . . . In the Complaint, it is alleged that, among other things, the Company engaged in (a) repeated and willful failure to pay hourly employees overtime compensation in violation of the FLSA, (b) willful discrimination and retaliation against employees who attempted to exercise their rights under the FLSA, and (c) willful falsification and alteration of employees' time records, and failure to keep proper and required time records, in violation of

allegations were further publicized in March and September 1992, when a committee of the United States House of Representatives convened hearings to review the DOL's response to the *Carpenter* complaint.

In the months that followed the filing of the *Carpenter* complaint, former employees filed eleven lawsuits against Food Lion alleging, among other things, that they had been required to work off the clock in violation of the FLSA. Although most of these lawsuits were filed as "collective" actions, Food Lion could do little to investigate the allegations beyond looking into the particular circumstances of the individuals who were named in the complaints. Food Lion publicly disclosed the existence of the litigation and the nature of the allegations in filings with the SEC.[4] As with the

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> the FLSA. The complainants request that the Department of Labor conduct an immediate investigation into the alleged violations and bring suit on behalf of the affected class of present and former employees of the Company to obtain damages and civil monetary penalty for past violations and injunctive relief against future violations.
>
> Management and legal counsel for the Company are currently investigating and evaluating the allegations contained in the Complaint. The Company has not been notified whether the Department of Labor will conduct an investigation into the allegations.
>
> The ultimate liability, if any, which may result is not presently determinable; however, in the opinion of management, any liability will not have a material adverse affect on the financial condition of the Company. Management believes that the Company has meritorious defenses to the allegations and the Company intends to defend the allegations vigorously.

[4] For example, Food Lion's Form 10Q filed March 27, 1992, provided the following description of one such lawsuit:

> On October 16, 1991, Donald T. Ledford and Michael J. Oakes, former employees of the Company, filed a Complaint with the

Carpenter complaint itself, however, Food Lion's management had considerable doubts about the validity of the allegations of widespread wage and hour violations alleged in the lawsuits, since those allegations were contradicted by Food Lion's internal reports and audits, and investigation of the relative handful of individuals identified in the various complaints provided no basis for believing that any violations were other than sporadic.

United States District Court for the Western District of North Carolina under the FLSA . . . . Plaintiffs purported to bring the action "on behalf of persons who are 'employees' within the meaning of FLSA, all of whom have been damaged by the acts and practices complained of herein." The Complaint alleged that the named Plaintiffs routinely worked hours in excess of 40 per week but were not compensated for the overtime as required under the FLSA. The Complaint further alleged that the Company had actual or constructive knowledge of the overtime work and "suffered, permitted and/or required that hours in excess of 40 hours per week be worked." Plaintiffs seek compensatory and liquidated damages "in an amount in excess of $10,000" under the FLSA, together with attorneys' fees, other litigation and court costs, and an injunction prohibiting further violations of the FLSA. Plaintiffs also assert in the alternative a pendant state law claim for compensation for unpaid hours worked under the doctrine of unjust enrichment and *quantum meruit*. On October 23, 1991, Plaintiff submitted an Amended Complaint which added the names of Michael Cardoza, R. Chuck Villarreal, Jr., Roy Sarter, and Larry Worley as named plaintiffs. The Amended Complaint adds an allegation that the Company's policies, including "effective scheduling," cause or result in "off-the-clock" work. The requested relief remains the same under the Amended Complaint. Since the filing of the Complaint and Amended Complaint, an additional 25 former Food Lion employees have filed notices with the Court seeking to be parties to this proceeding.

In the summer of 1993, despite the DOL's continued refusal to provide Food Lion with sufficient information to permit an investigation of the *Carpenter* complaint and the absence of any evidence from its internal audits and surveys of any widespread problem, Food Lion decided to settle the *Carpenter* complaint in order to avoid the economic and reputational injuries that would have accompanied the threatened DOL action regardless of its ultimate outcome. The settlement agreement required Food Lion to pay $16.2 million, including $13.2 million in back wages for current and former employees. Under the terms of the settlement, payments were to be made to employees whether or not they claimed to have worked off the clock. The summary judgment record before the district court below included testimony from expert witnesses for both petitioners and Food Lion agreeing that the amount of the *Carpenter* settlement was immaterial relative to Food Lion's earnings.

C. The *PrimeTime Live* Broadcast

On November 5, 1992, the ABC television program *PrimeTime Live* ("*PTL*") devoted approximately twenty-three minutes of an hour long broadcast to a segment purporting to disclose widespread sanitation problems and labor law violations at grocery stores owned by Food Lion. Although the undercover videotape that gave the show the appearance of authenticity had been filmed at only three out of approximately 1,000 Food Lion stores, the program created the impression that the conditions described in the broadcast could be found throughout the chain. The program suggested that the alleged sanitation problems and labor law violations were attributable to Food Lion's scheduling system, which ABC characterized as providing too little time for employees to complete assigned tasks. Most of the program focused on the alleged sanitation problems; although ABC repeated the

UFCW's allegations and presented seven individuals who claimed to have worked off the clock, the program did not document a single incident of off-the-clock work.

Food Lion denied the *PTL* allegations, and denies them to this day. Nevertheless, the day after the show aired, the price of Food Lion stock fell just over ten percent. Food Lion presented uncontroverted evidence that the reason for the change was not that investors believed the allegations, but that they were concerned that the program's sensationalized allegations of unhealthy food handling practices would cause shoppers to take their business elsewhere.

D. The Securities Fraud Allegations

One week after the *PTL* broadcast, petitioners filed the two lawsuits that were subsequently consolidated into this action. Both complaints alleged violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and 78t(a) and Rule 10b-5, 17 C.F.R. § 240.10b-5, as well as fraud, deceit, and negligent misrepresentation under North Carolina law. Treating the allegations of the broadcast as if they were established fact, petitioners claimed that Food Lion had violated the securities laws by failing to disclose[5] in

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[5] In characterizing the "gravamen" of their complaints as being that Food Lion and Tom Smith "failed to disclose, *and expressly denied*, widespread illegal labor practices that artificially inflated its stock earnings and margins and, in turn, the value of its stock," Pet. at 4 (emphasis added), petitioners materially misstate the position they took below. As the district court expressly noted in its opinion, at the hearing on Food Lion's motion for summary judgment petitioners argued that "this is a case about what Defendants *omitted to say* in their Annual and Quarterly Reports about current facts concerning Food Lion. . . . [T]he Court will address Plaintiffs' arguments that Defendants engaged in securities fraud because Defendants *omitted material information* from Food Lion's Annual and Quarterly Reports." App. 112a n.9 (emphasis added)]. The only

filings with the SEC that its growth in size and profitability was attributable to a policy that caused employees to neglect sanitation practices and perform large portions of their work "off-the-clock." Petitioners identified fourteen specific statements in annual and quarterly reports filed by Food Lion with the SEC that they claimed were misleading or failed to disclose material facts regarding the sanitary conditions in its stores and the dependence of its operating margins and profits on its allegedly unlawful policies.[6] Significantly, *none* of the statements relied on by petitioners in their petition for certiorari (Pet. at 8-14) was included in the list of statements alleged in their complaints to be false or misleading.

E. The Decisions of the Courts Below

After extensive discovery, Food Lion and Tom Smith moved for summary judgment. In a lengthy (55-page) decision, the district court granted their motion. With respect to petitioners' sanitation claims, the court found that petitioners' evidence established only isolated instances of workplace errors that a reasonable investor would not find material as a matter of law. With respect to petitioners' claims of widespread labor law violations, the court found that the press releases issued after the filing of the *Carpenter* complaint and Food Lion's quarterly and annual filings with the SEC fully disclosed the existence of the allegations and the alleged effects of off-the-clock work on Food Lion's

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"denials" that petitioners point to are statements that they did not challenge as fraudulent in the district court. Petitioners' characterization attempts to shift their theory of the case from the omissions case that they argued in the district court to the misleading statement case that they believe they need to obtain review here.

[6] A complete list of the statements that petitioners challenged in their complaints is listed in the district court's opinion. App. 60a-65a.

profits, and therefore that petitioners could not prove justifiable reliance on an artificially inflated stock price. The court also held with respect to both claims that petitioners had failed to offer evidence that Food Lion or Tom Smith acted with scienter in failing to disclose problems with poor sanitation or labor law violations in Food Lion stores. Because petitioners failed to establish liability under Section 10(b), the court also dismissed their claim against Tom Smith under Section 20(a). Significantly, *none* of the statements relied on by petitioners in their petition for certiorari was challenged as false or misleading in their opposition to Food Lion's motion or was addressed by the district court in ruling on that motion.

The Fourth Circuit affirmed.[7] With respect to the claims of widespread labor law violations, the court noted that the general statements that appeared in Food Lion's annual and quarterly reports constituted "immaterial puffery that is not actionable under the securities laws," had not been shown to be untrue, and did not bear on the claims of off-the-clock work in any event. App. 25a n.2. The court then turned to petitioners' contention that Food Lion's statements denying the allegations of widespread labor law violations in the *Carpenter* complaint were misleading.[8] The court concluded that the statements were not actionable because the risk to

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[7] With respect to the sanitation claims, the court agreed with the district court that petitioners' evidence showed, at most, only isolated instances of workplace errors, and that these isolated instances were not material to the price of Food Lion's stock. App. 23a. Petitioners do not challenge this portion of the court's ruling.

[8] The court of appeals did not address Food Lion's objection to the court's consideration of those statements on the grounds that they had been identified as actionable neither in petitioners' complaints nor in the summary judgment proceeding in the district court, presumably because the issue was mooted by its disposition of the issues it did address.

earnings that such claims presented had previously been disclosed to the market. "The market had a full opportunity to evaluate these claims and to reflect their risk in the market price for Food Lion stock. . . . The PrimeTime Live broadcast added nothing to inform the market further." App. 19a.

> Because the market was thus informed of the union's charges before PrimeTime Live aired, what Prime Time Live disclosed was not material. Indeed, even the much larger problem alleged more than a year earlier by the union was not material. Food Lion settled all of the claims made by the union with the Department of Labor for $16.2 million, $8.1 million payable in each of 1993 and 1994. During the same period, Food Lion's earnings exceeded $200 million per year. Experts on both sides agree that this settlement, reflecting a charge of less than two cents per share for each year, was not material to Food Lion's stock price. And consistent with this conclusion, Food Lion's share price did not drop following announcement of the Department of Labor settlement.

App. 20a.

REASONS TO DENY THE WRIT

The Court should deny the Petition for three reasons. *First*, the issue framed by petitioners was not decided or addressed by the court below, and the position that petitioners ascribe to the court is not implicit in the court's decision. The court's analysis of the issues it did consider is fully consistent with the decisions of this Court and other courts of appeals. *Second*, this case would not present a good vehicle for addressing the issue presented in any event, because of the presence of collateral questions that would have to be decided before the issue could be considered. *Third*, the presence of alternative, unchallenged grounds for affirming the district court's decision will require that the decision be affirmed without regard to the resolution of the issue presented, rendering consideration of the issue an unwise investment of this Court's time.

I. THE DECISION BELOW DOES NOT RAISE THE ISSUE PRESENTED IN THE PETITION

According to petitioners, the Fourth Circuit ruled that the fraud-on-the-market presumption of reliance may be rebutted by a public statement that provides accurate information to the market, without regard to the credibility of the public statement's source. Pet. at 3. Petitioners contend that review should be granted because the Fourth Circuit's analysis "promises to effectively eliminate the fraud on the market presumption in that jurisdiction." *Id.* The court of appeals made no such ruling, and its analysis presents no risk to the continued viability of the fraud-on-the-market presumption in the Fourth Circuit.

At the outset, it should be noted that petitioners have misstated the holdings of both the district court and the court of appeals. According to petitioners, the "district court ruled

that Food Lion's illegal labor practices were fully disclosed to the public on September 11, 1991—the date of an announcement by the [UFCW] that it had filed a complaint against Food Lion with the United States Department of Labor." Pet. at 4. Similarly, petitioners state that the "[t]he sole ground articulated by the court below for affirmance on the labor practices question was that the UFCW's September 11, 1991 press release fully disclosed to the market the existence of Food Lion's widespread illegal labor practices." Pet. at 17. Contrary to these characterizations, neither court based its ruling solely on the UFCW's press release. The district court explained as follows:

> [B]ased on the evidence before this Court, the Court finds that the numerous press releases *beginning September 11, 1991, as well as* Food Lion's disclosure of employee allegations of labor violations in the same Annual and Quarterly Reports which Plaintiffs contend omitted this same information, informed the market of the potential risks associated with the employee allegations of working off the clock in violation of the FLSA. The Court finds that *the market was repeatedly made aware* that Food Lion was facing numerous employee complaints of working off the clock as a result of the Effective Scheduling System and that thirty-seven percent of Food Lion's profits possibly were attributable to employees working off the clock. In the face of the substantial disclosure of the risks that Food Lion faced based upon the allegations of labor violations, the Court finds that any further disclosure about the specifics of Food Lion's questioned labor practices would not be material as a matter of law.

App. 94a (emphasis added); *see also id.* at 96a-97a. Similarly, the Fourth Circuit referred to the September 11

press release only as one of a number of ways the relevant information was disclosed to the market.

> Plaintiffs' securities fraud claim cannot succeed because, despite the fact that Food Lion denied the charges, the nature of the off-the-clock claims and the claims' risk to earnings were in fact well known to the market before the PrimeTime Live broadcast, and therefore Food Lion's omissions were not material. . . . *On September 11, 1991, for instance*, more than a year before the PrimeTime Live broadcast, the UFCW publicly announced that it had filed a complaint with the Department of Labor, asserting that 183 people had claimed to have illegally worked off the clock, that "[m]ore than 37 percent of the after tax profit" of Food Lion was attributable to off the clock work, and that "Food Lion could owe as much as $194 million in back wages."

App. 19a (emphasis added).

These excerpts make clear that the courts below did not base their decisions on a factual determination that the UFCW's September 11, 1991 press release was as credible a source as the November 5, 1992 *PTL* broadcast. Rather, the courts recognized that the broadcast, like the press release, merely informed the market of *allegations* of unproven violations, and that those *allegations* had already been fully disclosed on numerous occasions prior to the broadcast, including disclosures by Food Lion itself. In these circumstances, the relative credibility of the various sources of the allegations simply was not a factor in the courts' decisions.

The Fourth Circuit's analysis is in no way inconsistent with decisions of this Court and other courts of appeals. None of the cases cited by petitioners holds a company liable for failing to disclose as fact information that the company

does not know to be true. For example, in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which endorsed the fraud-on-the-market theory, the defendant company publicly denied that it was engaged in merger negotiations when in fact it was engaged in such discussions; although the company disputed whether it was required to disclose the negotiations, there was no dispute that it knew of their existence at the time of its denials.[9] Similarly, in *In re Apple Securities Litigation*, 886 F.2d 1109 (9th Cir. 1989), the only statements that the court held to be actionable were made at a time when the company indisputably knew that its own internal tests showed the statements to be false. *Id.* at 1115.[10] In these circumstances,

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[9] The Fourth Circuit clearly did not understand its decision to conflict with *Basic*, which it relied on in its opinion (App. 24a-25a n.1) and had cited in previous decisions discussing the fraud-on-the-market theory. *See, e.g., Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993); *Malone v. Microdyne Corp.*, 26 F.3d 471, 476 n.5 (4th Cir. 1994); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1261 (4th Cir. 1993). *See generally Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204 (4th Cir. 1994) (summarizing cases).

[10] In *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996), *cert. denied*, 522 U.S. 808 (1997), which petitioners also cite, the plaintiffs' evidence was held sufficient to create a triable issue regarding falsity of the company's public statements, and the case was remand for further proceedings on that issue. None of the cases cited by petitioners provides any discussion bearing on the application of the truth-on-the-market defense in the context of unproven allegations, and nothing in any of the cases is remotely inconsistent with the Fourth Circuit's opinion. *See, e.g., Berry v. Valence Tech., Inc.*, 175 F.3d 699 (9th Cir.) (magazine article held insufficient to trigger statute of limitations; no discussion of company's knowledge of misstatement), *cert. denied*, 120 S. Ct. 528 (1999); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996) (evidence of actual market knowledge, "while proper grist of the summary judgment mill," held inappropriate for consideration on motion to dismiss); *Sailor v. Northern States Power Co.*, 4 F.3d 610 (8th Cir. 1993) (utility, which had disclosed the existence of its pending request for a rate increase, not

it makes sense to excuse material misstatements only upon a showing by the company that the same information had "credibly entered the market" through other sources and thereby "dissipated the effects of the misstatements." *See Basic*, 485 U.S. at 249.

When the information consists only of unproven allegations of wrongdoing, courts have taken a different approach. Companies are not required to predict the accuracy of such "soft" information. For example, in *In re Sofamor Danek Group, Inc.*, 123 F.3d 394 (6th Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998), shareholders filed a securities fraud action against a manufacturer of medical devices, claiming, *inter alia*, that the company had illegally supported a non-profit foundation and had failed to disclose that it was unlawfully promoting certain of its products for an unapproved use. Like petitioners here, the shareholders in *Sofamor Danek* claimed that the growth in revenues and earnings reported by the company were in fact due in part to its unlawful promotional practices. Like Food Lion here, Sofamor Danek had disclosed all that it knew, *i.e.*, the fact that it had received a "warning letter" from the Food and Drug Administration regarding the alleged unlawful promotional practices. Noting that the shareholders did not challenge the accuracy of the sales and earnings data that the company reported, the court distinguished such "hard" data from "soft" information, such as opinions and predictions. *Id.* at 401. "The legality of Sofamor Danek's support for the non-profit foundation, for example, was a matter of opinion—'soft information.' And 'our cases firmly establish that soft information . . . must be disclosed only if . . . virtually as certain as hard facts.'" *Id.* at 402, quoting *Starkman v.*

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required to speculate about its chances of success); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989) (same).

Marathon Oil Co., 772 F.2d 231, 241 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986). The court also explained the difficulty that a contrary ruling would create:

> If the company had publicly opined that its support of the non-profit foundation was illegal, and if it had publicly predicted that the FDA would move against the company, the opinion would have come to look increasingly questionable with the passage of time, and the prediction would have proved to be flatly erroneous. This illustrates, we think, why predictions not "substantially certain to hold," like most matters of opinion, simply do not come within the duty of disclosure.

Id. at 402.

Food Lion disclosed all that it could disclose when it reported the existence of the allegations; as the district court's finding on the absence of scienter confirms, the information available to Food Lion did not establish that the allegations were true, and Food Lion therefore cannot be faulted for not admitting the existence of widespread violations. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (cause of action for securities fraud requires evidence of scienter). Indeed, given the subsequent settlement of the claims of widespread violations for an amount that even petitioners' expert admitted was immaterial, any "admission" by Food Lion suggesting that the allegations could result in material liability could have itself been an actionable misstatement. The Fourth Circuit's analysis is fully consistent with the treatment of "soft" information by the courts.

II. THE COURT WOULD NOT REACH THE ISSUE PRESENTED IF THE WRIT WERE GRANTED

Petitioners' securities fraud claim requires a showing that Food Lion made a statement that was false or misleading as to a material fact. *Basic*, 485 U.S. at 238. The court below found that the general statements of corporate well-being in Food Lion's annual and quarterly reports, *i.e.*, all of the statements listed in petitioners' complaints, were not actionable because they constituted "immaterial puffery," had not been shown to be false, and did not say anything about off-the-clock work. The court went on, however, to address petitioner's contention that additional statements by Food Lion denying the UFCW's claims could be actionable, rejecting them as immaterial because of the information already in the market. Although Food Lion argued that the statements denying the UFCW's claims should not be considered because they had not been challenged in the district court as actionable statements and could not be raised for the first time on appeal,[11] the court did not address that argument in its opinion, presumably because its disposition rendered the argument moot. Petitioners do the same thing here, spending seven pages of their petition discussing

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[11] The requirement that fraud be pled with particularity, Fed. R. Civ. P. 9(b), precluded petitioners from premising their appeal on statements that they had not listed in their complaint and had not raised in the district court to support their claims. *See Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 218 n.12 (4th Cir. 1994); *Moody v. Empire Life Ins. Co.*, 849 F.2d 902, 906 (5th Cir. 1988). The impropriety of petitioners' reliance on statements that were not identified in their complaints is compounded by their attempt here to substitute a "misrepresentation" theory for the "omissions" theory they presented to the district court. *See* n.5, *supra*; App. 106a-107a; 112a-113a n.9.

numerous statements by Food Lion that were not raised in their complaint. Pet. at 9-15.

In order to reach the issued presented by petitioners, it will therefore be necessary for this Court first to decide either that the court of appeals erred in characterizing the general statements in Food Lion's filings with the SEC as "immaterial puffery," or that petitioners can properly premise arguments in the court of appeals and this Court on evidentiary grounds not presented to the district court. The first alternative would require the Court to decide an inherently case-specific issue that even petitioners do not believe to be appropriate for this Court's consideration, having not raised it in their petition. The second alternative would require a finding by this Court that consideration of the issue is justified by the presence of extraordinary circumstances. *See Hormel v. Helvering*, 312 U.S. 552, 56 (1941); *Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). In neither case is it likely that this Court would ultimately find that it is proper to consider the issue presented.

III. THE UNDISPUTED EVIDENCE THAT THE CLAIMS OF WIDESPREAD LABOR LAW VIOLATIONS WERE SETTLED FOR AN AMOUNT CONCEDED TO BE IMMATERIAL, AND THE DISTRICT COURT'S RULING THAT PETITIONERS DID NOT ESTABLISH SCIENTER, DISPEL ANY REASON FOR REVIEW

Even if review of the Fourth Circuit's decision was otherwise warranted, the existence of alternative grounds for affirming its ruling renders consideration of petitioners' arguments unnecessary. In particular, the court of appeals' observation that the "much larger" off-the-clock problem alleged by the UFCW had been settled for an amount that

experts on behalf of both Food Lion and petitioners agreed was immaterial in light of Food Lion's earnings provides an independent ground for affirming the result reached below. Although petitioners speculated that the settlement could have had costs in addition to the wage claims reflected in the monetary settlement, they did not support their argument with evidence sufficient to create a genuine issue of fact regarding the materiality of any such costs. Mere speculation about the existence and amount of additional costs is insufficient to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Similarly, in addition to finding that Food Lion's alleged omissions were immaterial, the district court held that petitioners' evidence was insufficient to establish that Food Lion or Tom Smith had acted with scienter in failing to admit that the allegations of widespread labor law violations were true. Scienter is an essential element of a securities fraud claim under Section 10(b). *Ernst & Ernst v. Hochfelder*, 425 U.S. at 193. Even in the unlikely event that this Court was to find that the Fourth Circuit had somehow erred, there is no reason to think that the district court's finding on scienter would be reversed.

Because review of the Fourth Circuit's decision is unlikely to change the outcome of the case, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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